SUPREME COURT, U. S.
DEC 17 1966
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

NO. 876

FRANCES D. KROHN,
Petitioner,

vs.

RICHARDSON-MERRELL, INC.,
THE WILLIAM S. MERRELL COMPANY
DIVISION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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Petitioner Frances D. Krohn prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Tennessee entered in the above entitled case on September 23, 1966, denying petitioner's petition to rehear and adhering to the original opinion rendered July 18, 1966.

OPINIONS BELOW

The trial Court did not render a written Opinion, but did enter a written Order, Appendix, *infra.*, p. 1a. The original Opinion of the Supreme Court of Tennessee and its Opinion on Petition to Rehear are published, ... Tenn. ..., 406 S.W. 2d 166 (1966), Appendix, *infra.*, p. 2a-11a; 12a.

JURISDICTION

The judgment of the Supreme Court of Tennessee was rendered on July 18, 1966, and was entered on its minutes of that date. A Petition to Rehear was seasonably filed and on September 23, 1966, was denied by the Supreme Court of Tennessee and judgment thereon was entered on its minutes of that date. *Krohn v. Richardson-Merrell, Inc.*, (1966) ... Tenn. ..., 406 S.W. 2d 166.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3). The Federal question was raised and decided adversely to Petitioner in the State Court proceedings. *Krohn v. Richardson-Merrell, Inc.*, (1966) ... Tenn. ..., 406 S.W. 2d 166.

QUESTION PRESENTED

Whether it is an invidious and unconstitutional discrimination against a female spouse under the equal protection of the laws clause of the Fourteenth Amendment to the Constitution of the United States for the decisional law of the State of Tennessee (absent any statute) to permit a suit by a husband for loss of his wife's consortium caused by the negligent and willful act of a defendant and

to deny such remedy to a wife for loss of her husband's consortium in a similar case.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are those of the Fourteenth Amendment to the Constitution of the United States which provide that no State shall deny to any person within its jurisdiction the equal protection of the laws, as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

The suit was brought in the trial court by petitioner who alleged as her cause of action that by the willful, tortious and negligent acts of the defendant causing bodily injuries to her husband she had lost his consortium, for which loss she sought damages.

The final form of plaintiff's statement of her case, and to which the demurrer was sustained, is contained in the First Amended Declaration, as amended, and Supplement to First Amended Declaration, which are included in the Appendix, *infra.*, pp. 13a, 21a.

The defendant filed a demurrer as follows:

"Comes now the defendant, through its attorneys, and demurs to the declaration heretofore filed in this cause upon the ground and there is no warrant in law for the maintenance of such action as the plaintiff seeks, because she could not maintain such a suit at common law and there is no statute in Tennessee permitting its maintenance.

"WHEREFORE, DEFENDANT PRAYS JUDGMENT UPON ITS DEMURRER." Appendix, *infra.*, p. 24a.

The Trial Judge sustained the demurrer, without written Opinion other than that stated in his Order sustaining the Demurrer as follows:

"This cause was heard on Motion of defendant to dispose of its Demurrer to the Declaration in this cause consisting of the First Amended Declaration and of Supplement To The First Amended Declaration, when, having heard the argument of counsel and upon due consideration the Court is of opinion and finds that a wife has no such cause of action in Tennessee and the Demurrer should be sustained." From Trial Court Order, Appendix, *infra.*, p. 1a.

Petitioner appealed to the Supreme Court of Tennessee and filed her "Assignments of Error, Brief and Argument," assigning the following errors:

"1. The Trial Court erred in sustaining the demurrer to the Declaration. TR. p. 31.

"2. The Trial Court erred in finding and ruling that there is no such cause of action in Tennessee *under these particular facts* and as a result in dismissing Appellant's suit. TR. p. 31." Appendix, *infra.*, p. 25a.

When the case now *sub judice* was presented to the Supreme Court of Tennessee that Court had already committed itself to the rule that a wife has no cause of action for loss of her husband's consortium through accidental injuries to her husband notwithstanding that the Court allows such a cause of action to a husband for loss of his wife's consortium. *Rush v. Great American Insurance Co.*, (1964) 213 Tenn. 506, 376 S.W. 2d 454.

However, in this case in which *certiorari* is now sought, the Supreme Court of Tennessee for the *first* time had before it for decision the questions whether the rule mentioned could stand when challenged by a wife, (1) alleging willful injuries to her husband and (2) contending that the rule resulted in a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Petitioner contended in the Supreme Court of Tennessee (1) that its prior pronouncement denying a wife a cause of action for loss of consortium through a defendant's *negligent* injury of her husband was not binding in this case where the plaintiff alleges *willful* injury of her husband and (2) that its prior decision adverse to a wife's cause of action for mere negligent injury of her husband should be re-examined and overruled and (3) that petitioner had been denied the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States, inasmuch as the Tennessee decisions recognize in the husband a right denied to the wife solely by reason of her sex.

The Supreme Court of Tennessee wrote two Opinions: In the first it (1) declined to distinguish a case of willful injury from one of accidental injury, (2) declined to reverse its prior ruling adverse to a wife's cause of action

and (3) held that there was no merit in the constitutional question raised by petitioner. To avoid any possiblity that this Opinion might be construed as failing to pass on the constitutional question petitioner filed a Petition for Rehearing (R. p. 106). The Court rendered a second Opinion making it clear (1) that petitioner has an adequate basis for presentation of the federal question to this reviewing court, and (2) that the court was holding that the State's decisional law in favor of a husband's cause of action but against a wife's similar cause of action was permissible "classification" rather than impermissible "discrimination."

The published report of the decision of the Supreme Court of Tennessee originally and on the petition for rehearing shows in the Statement and Syllabus that the Court held that the Fourteenth Amendment was not violated by a refusal to allow a wife recovery for loss of consortium, although a husband is allowed such recovery. *Krohn v. Richardson-Merrell, Inc., supra.*

The constitutional question was properly before the Supreme Court of Tennessee and was decided by it adversely to the petitioner who asserted and relied on the constitutional guaranty.

Petitioner submits that the result is an invidious discrimination which denies to her the equal protection of the laws guaranteed to her by the Fourteenth Amendment.

REASONS FOR GRANTING WRIT

1. This Court is the Court of last resort in defining the scope and application of the provisions of the Fourteenth Amendment in cases involving the rights of individuals to *equality* before the law.

2. A *conflict* exists in the decisions of the State and Federal Courts respecting the constitutional question here presented.

In *Clem v. Brown*, (Ohio 1965) 207 N.E. 2d 398, the State Court applied the equal protection of the laws clause of the Fourteenth Amendment of the Constitution of the United States and allowed a suit by a wife for loss of her husband's consortium, while observing that except for this clause the law of *Ohio* would not allow such a suit.

Similarly in *Owen v. Illinois Banking Corporation*, (W.D. Mich. 1966) ... F. Supp. ..., in a case involving *Indiana* law, the United States District Court denied a motion to set aside a verdict in favor of the plaintiff wife, holding that it would deny equal protection if the laws of a state should deny the right to sue for loss of consortium when applied to a wife but not a husband. The Court thought such a distinction or classification unreasonable, impermissible and a violation of the Fourteenth Amendment guarantee. As this Opinion has not yet been published, copy is in the Appendix, *infra.*, p. 25a.

On the other hand, the Supreme Court of *Tennessee*, in the case *sub judice*, holds that the distinction is a permissible "classification" rather than an impermissible "discrimination."

3. The decision of this Court on the question involved is of far-reaching present and future importance to the public interest and to the orderly disposition of a multitude of cases which will crowd court calendars, State and Federal, awaiting a decision of this Court on the question. The question is squarely raised and presented for decision by this Honorable Court of last resort so

that all the uncertainty, delay and needless expense, otherwise inevitable, can be avoided.

4. The decision of the Supreme Court of Tennessee is *erroneous* in that it deprives petitioner of her constitutional guaranty against invidious discrimination based solely on the fact that she is a woman rather than a man.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Nashville, Tennessee,

Counsel for Petitioner.

WATKINS, McGUGIN & STEWART,
Of Counsel.

December 1966

AFFIDAVIT OF SERVICE

I, Dan E. McGugin, counsel for the Petitioner, being first duly sworn according to law, depose and say:

I have this day of December, 1966, served a true and exact copy of the foregoing petition for a writ of certiorari upon the Honorable John K. Maddin, Jr., of Gracey, Buck, Maddin & Cowan, 300 James Robertson Parkway, Nashville, Tennessee, 37201, Counsel for the

Respondent Merrell-Richardson, Inc., The William S. Merrell Division, by delivering the same to his office at the address first shown.

.....
DAN E. McGUGIN

Sworn to and subscribed before me
this day of December, 1966.

.....
Notary Public

My Commission Expires:

ACKNOWLEDGEMENT

I acknowledge receipt of a true and exact copy of the foregoing Petition this day of , 1966.

.....
John K. Maddin, Jr.
Counsel for Respondent
Richardson-Merrell, Inc.
The William S. Merrell Company
Division, Respondent